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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID JON RALJEVICH, Defendant and Appellant.	B200019 (Los Angeles County Super. Ct. No. YA067117)

APPEAL from a judgment of the Superior Court of Los Angeles County, James Brandlin, Judge. Affirmed.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

David Jon Raljevich appeals from the judgment entered following his convictions by jury on count 3 - possession of a controlled substance for sale (Health & Saf. Code, § 11378) and count 4 - receiving stolen property (Pen. Code, § 496, subd. (a)) with a court finding that he suffered a prior felony conviction (Pen. Code, § 667, subd. (d)). The court sentenced appellant to prison for seven years four months. Appellant claims sentencing errors occurred. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on January 9, 2007, circuit breakers which had been stolen from the parking structure of the Little Company of Mary Hospital in Torrance were in some ivy near the parking structure. Sometime after 10:00 a.m. on that date, appellant took from the ivy two of the circuit breakers, knowing they were stolen, and put them in a duffel bag. A security guard witnessed this and called out to appellant. Appellant fled, leaving the bag containing the two circuit breakers. The guard chased appellant and detained him until a police officer arrived.

During a patdown search of appellant, the officer felt an object in appellant's front pants pocket. Appellant indicated the object was medication for pneumonia. The officer retrieved the object, which was a large baggy containing three small baggies. The three small baggies contained a total of six grams of methamphetamine. A narcotics expert testified appellant possessed the methamphetamine for sale.

Another officer interviewed appellant at the police station, and appellant told that officer the following. Appellant was an unemployed electrician. In July 2006, appellant met a friend who owned an electronics business in Torrance. Appellant periodically asked the friend for work. About 7:30 a.m. on January 9, 2007, the friend called appellant and told him to pick up some circuit breakers which were in bushes at the hospital. The friend paid appellant for picking up the circuit breakers by giving him $200 worth of methamphetamine. Appellant intended to sell the methamphetamine. In order to get to the hospital, appellant rode a bus and took his bicycle. Appellant left his bicycle

at Hawthorne and Torrance. Appellant was supposed to meet his friend at 10:00 a.m. to give his friend the circuit breakers. Appellant presented no defense evidence.

CONTENTIONS

Appellant claims (1) he received ineffective assistance of counsel when his trial counsel failed to object to the trial court's imposition of consecutive sentences on counts 3 and 4, and (2) the trial court committed *Cunningham* error by imposing the upper term on count 3.

DISCUSSION

Appellant Was Not Denied Effective Assistance of Counsel, and No Cunningham Error Occurred.

1. *Pertinent Facts.*

The information alleged that appellant suffered five prior felony convictions for which he served separate prison terms for purposes of Penal Code section 667.5, subdivision (b): a 1992 conviction for burglary in case No. NA009420, a 1993 conviction for burglary in case No. NA016134, a 1997 conviction for burglary in case No. NA033682, a 2002 conviction for petty theft with a prior conviction in case No. TA064203, and a 2005 conviction for false personation in case No. NA068171. The 1992 conviction was also alleged as a strike.

The preconviction probation report reflects as follows. Appellant suffered the above 1992, 1997, and 2002 convictions, and was sentenced to prison for the 1992 and 1997 convictions. As to the 2002 conviction, the court in that case imposed a six-year prison sentence, suspended execution thereof, and placed appellant on probation for three years.

In the probation report, the probation officer indicated as follows. Appellant was 45 years old, had been to prison twice, and had performed poorly on probation.[1] Appellant conveyed himself as a person who did not care to improve himself. He was on probation at the time he committed the present offenses.

The report listed as aggravating factors that the planning, sophistication, or professionalism with which the crime was carried out, or other facts, indicated premeditation (Cal. Rules of Court, rule 4.425(a)(8)), and the crime involved an attempted or actual taking or damage of great monetary value (rule 4.425(a)(9)). The report listed as additional aggravating factors that appellant's prior convictions as an adult or juvenile adjudications were numerous or of increasing seriousness (rule 4.425(b)(2)), he had served prior prison terms (rule 4.425(b)(3)), he was on probation or parole when he committed the offense (rule 4.425(b)(4)), and his prior performance on probation or parole was unsatisfactory (rule 4.425(b)(5)). The report indicated there were no mitigating factors and recommended imposition of the "high-base" term.

Following jury argument on the substantive offenses, appellant waived his right to a jury trial on the prior conviction allegations in favor of a court trial. After the jury convicted appellant on the substantive offenses, the court conducted said court trial.

At the court trial, the People introduced into evidence Court's exhibit No. 1, a Penal Code section 969b prison packet which presented evidence that appellant had suffered the previously mentioned 1992, 1993, and 1997 convictions. The court took judicial notice of the contents of the superior court file pertaining to the 2002 conviction (except that the court did not take judicial notice of the probation report in that file). The court found true the strike allegation. The People later moved to dismiss the Penal Code section 667.5, subdivision (b) allegations, explaining the People preferred to use the underlying prior convictions to support imposition of an upper term.

At the sentencing hearing, appellant, citing *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856, 127 S.Ct. 856] (*Cunningham*), asked that the court impose the middle term because "the priors which the court will rely on to support the aggravating factors" were not factors decided by a jury. The court concluded appellant had waived his right to jury trial on the issue of whether he had suffered the prior

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1 The probation officer noted, inter alia, that appellant had failed to report to the probation department and was arrears in his payment of his financial obligation.

convictions for purposes of their use as aggravating factors and, in any event, *Cunningham's* jury trial requirement did not apply to prior convictions. The court noted there was an issue as to whether recent legislation applied retroactively to eliminate any *Cunningham* issue, but the court indicated it did not have to reach that issue "because the prior convictions certainly support the high term."

The People later asked the court, inter alia, to impose consecutive sentences on counts 3 and 4. Appellant indicated he did not wish to be heard. The trial court sentenced appellant to prison for seven years four months, consisting of six years on count 3 (the three-year upper term, doubled because of the strike), with a consecutive subordinate term on count 4 of one year four months (one-third the two-year middle term, doubled because of the strike). The court stated it imposed the upper term on count 3 "based upon the defendant's recidivist conduct, prior convictions, failures to complete probation or parole satisfactorily." The court did not state why it imposed consecutive sentences on counts 3 and 4.

2. *Analysis.*

a. *No Ineffective Assistance of Counsel Occurred.*

Appellant claims he received ineffective assistance of counsel when his trial counsel failed to object to the trial court's imposition of consecutive sentences on counts 3 and 4. We disagree. On appeal, if the record sheds no light on why counsel failed to act in the manner challenged, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, an ineffective assistance contention must be rejected. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1219.)

In the present case, there are two reasons why trial counsel may not have objected to imposition of consecutive sentences. First, Penal Code section 667, subdivision (c)(6), states, "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)."

"The statutory phrase 'committed on the same occasion' refers to 'at least a close temporal and spatial proximity between the acts underlying the current convictions.' (*People v. Deloza* (1998) 18 Cal.4th 585, 595, 599 . . . .) The statutory phrase 'arising from the same set of operative facts' refers to 'sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted.' (*People v. Lawrence* (2000) 24 Cal.4th 219, 233 . . . .)" (*People v. Coelho* (2001) 89 Cal.App.4th 861, 864, fn. 1.)

In the present case, the security guard saw appellant take the circuit breakers from the ivy, thereby receiving stolen property, then flee when the guard called out to him. The guard pursued appellant, and detained him until an officer arrived. There was no evidence that appellant obtained the subject methamphetamine after he received the stolen circuit breakers but before the officer arrived. The trial court reasonably could have concluded that appellant possessed the methamphetamine before he received the stolen circuit breakers.

The inference that appellant possessed the subject methamphetamine before he received the stolen circuit breakers was also supported by appellant's statement to the first officer that appellant possessed the methamphetamine as medication. That statement supported the inference that appellant possessed the methamphetamine even before January 9, 2007. The inference that appellant possessed the methamphetamine before he received the stolen circuit breakers is further supported by appellant's statement during the police interview. During that interview, appellant suggested that the subject methamphetamine was part of $200 worth of methamphetamine that his friend had given him on January 9, 2007, before appellant received the stolen circuit breakers. In particular, appellant's statement during the interview supported the inference that his friend gave the subject methamphetamine to appellant as early as 7:30 a.m. on January 9, 2007. Appellant received the stolen circuit breakers sometime after 10:00 a.m.

The trial court reasonably could have concluded that appellant possessed the subject methamphetamine (1) at least hours *before* appellant received the stolen circuit breakers near the hospital, and (2) *before* appellant took the bus to get to the hospital.

That fact is not altered by the fact that the trial court also reasonably could have concluded that appellant continued to possess the subject methamphetamine at the time he received the stolen property (as well as, of course, when the officer later recovered the methamphetamine from appellant's pants).

Accordingly, the trial court reasonably could have concluded as to counts 3 and 4 that there was a "current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts" within the meaning of Penal Code section 667, subdivision (c)(6), with the result that the imposition of consecutive sentences on those counts was mandatory, and, for this reason, appellant's trial counsel reasonably could have refrained from objecting to imposition of consecutive sentences.

There is another reason why appellant's trial counsel may not have objected to imposition of consecutive sentences. California Rules of Court, rule 4.425, provides, in relevant part, "Criteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) Criteria relating to crimes[.] [¶] Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] . . . [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. [¶] (b) Other criteria and limitations[.] [¶] Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except: [¶] (1) A fact used to impose the upper term."

In light of our previous analysis, appellant's trial counsel reasonably could have refrained from objecting to the imposition of consecutive sentences because he also believed that, even if the imposition of consecutive sentences was not mandatory under Penal Code section 667, subdivision (c)(6), the trial court would have imposed

consecutive sentences in the exercise of its discretion under Penal Code section 669,[2] and California Rules of Court, rule 4.425(a)(1) and/or (3).

Similarly, once the trial court correctly rejected appellant's argument that *Cunningham* precluded the trial court from relying upon prior convictions to impose the upper term, appellant's trial counsel reasonably could have refrained from objecting to the imposition of consecutive sentences because he believed that, even if the imposition was not mandatory under Penal Code section 667, subdivision (c)(6), the trial court would have imposed consecutive sentences in the exercise of its discretion, relying upon one or more of the aggravating factors listed in the probation report to do so.[3] Appellant's ineffective assistance claim fails.[4]

b. *No Cunningham Error Occurred.*

Appellant also claims the trial court committed *Cunningham* error by imposing the upper term on count 3. We disagree.

At the outset, we note appellant waived his right to a jury trial on the prior conviction allegations and had a court trial on them. He therefore arguably waived any right to a jury trial to determine the existence or nonexistence of his prior convictions as

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[2] Penal Code section 669, states, in relevant part, "When any person is convicted of two or more crimes, . . . the . . . subsequent judgment upon which sentence is ordered to be executed shall direct whether the terms of imprisonment or any of them to which he or she is sentenced shall run concurrently or consecutively."

[3] We need not decide whether appellant's trial counsel reasonably could have refrained from objecting to the imposition of consecutive sentences on the ground that counsel believed that, even if the imposition was not mandatory under Penal Code section 667, subdivision (c)(6), the trial court would have imposed consecutive sentences in the exercise of its discretion, relying upon the aggravating factor that the crime involved an attempted or actual taking or damage of great monetary value (rule 4.425(a)(9)).

[4] To the extent appellant independently claims that the trial court erred because it was unaware of its discretion to impose concurrent sentences on counts 3 and 4, we reject the claim because (1) he has failed to demonstrate that the trial court had such discretion, and (2) assuming the court had such discretion, he has failed to demonstrate that the court was unaware of such discretion. We also note appellant failed to make his claim in a separate heading in his brief.

aggravating factors. (See *People v. Earley* (2004) 122 Cal.App.4th 542, 549-550.) However, respondent does not raise this issue and we need not reach it.

"In *Cunningham*, the United States Supreme Court, applying principles established in its earlier decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 120 S.Ct. 2348] (*Apprendi*) and *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403, 124 S.Ct. 2531] (*Blakely*), concluded that California's [determinate sentence law] does not comply with a defendant's right to a jury trial. '[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' (*Cunningham, supra,* 549 U.S. at pp. ___-___ [127 S.Ct. at pp. 863-864].)" (*People v. Sandoval* (2007) 41 Cal.4th 825, 835 (*Sandoval*).)

The *Sandoval* court later observed, "*Apprendi* stated, 'Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt.' (*Apprendi, supra,* 530 U.S. at p. 490, italics added.)" (*Sandoval, supra,* 41 Cal.4th at p. 835.)

In *Blakely*, the high court concluded that "'the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*' ([*Blakely, supra,* 542 U.S.] at p. 303.)" (*Sandoval, supra,* 41 Cal.4th p. 836.)

In *People v. Black* (2007) 41 Cal.4th 799 (*Black*), our Supreme Court stated: "[W]e agree with the Attorney General's contention that as long as a single aggravating circumstance that renders a defendant *eligible* for the upper term sentence has been established in accordance with the requirements of *Apprendi* and its progeny, any additional factfinding engaged in by the trial court in selecting the appropriate sentence among the three available options does not violate the defendant's right to jury trial." (*Id.* at p. 812.) The court also stated, "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment

principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Id*. at p. 813.)

Black also stated, "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*Black, supra,* 41 Cal.4th at p. 816.)

The United States Supreme Court has recognized an exception to a defendant's Sixth Amendment right to a jury trial on an aggravating fact that renders him or her eligible for a sentence above the statutory maximum. The right to a jury trial and the requirement of proof beyond a reasonable doubt do not apply to the aggravating fact of a prior conviction. (*Sandoval, supra,* 41 Cal.4th at pp. 836-837.) In the present case, the trial court relied in part upon appellant's prior convictions to impose the upper term on count 3. No *Cunningham* error occurred. (Cf. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[5]

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J. ALDRICH, J.

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5 In light of our conclusion, there is no need to reach the issue of whether imposition of the upper term was also constitutionally based on appellant's failure to complete probation or parole satisfactorily. (See fn. 1; see also *People v. Towne* (2008) 44 Cal.4th 63, 71, 82-83.)